# No. 11,810

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

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JOSEPH P. LYNCH,

*Appellant,*

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,

*Appellee.*

## BRIEF FOR APPELLEE.

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## Subject Index


Page

Jurisdictional statement .......... 1

Statement of facts .......... 2

Contentions of appellant:

(1) He was coerced into entering a plea of guilty .......... 3

(2) He was denied his right of the effective assistance of counsel before the trial court .......... 3

Contentions of appellee:

(1) Appellant freely, voluntarily and intelligently entered a plea of guilty to the offense with which he was charged before the trial court .......... 3

(2) Appellant was not denied his right of the effective assistance of counsel before the trial court but was represented at all stages of the proceedings by able counsel .......... 3

Argument:

I.

Appellant freely, voluntarily and intelligently entered a plea of guilty to the offense with which he was charged before the trial court .......... 4

II.

Appellant was not denied his right of the effective assistance of counsel before the trial court but was represented at all stages of the proceedings by able counsel .......... 9

Summary .......... 17

Conclusion .......... 18

## Table of Authorities Cited

### Cases


| Cases | Pages |
|---|---|
| Dorsey v. Gill (CCA-DC), 148 Fed. (2d) 857, 876, 877 | 8, 15 |
| Glasser v. United States, 315 U. S. 60 | 9, 10, 16 |
| Johnson v. Zerbst, 304 U. S. 458, 468 | 15 |
| Lynch v. Johnston (CCA-9), 160 F. (2d) 950 | 2 |
| O'Keith v. Johnston (CCA-9), 129 F. (2d) 889, 891 | 9 |
| United States v. Lynch (CCA-3), 132 F. (2d) 111 | 13 |
| Waley v. Johnston, 316 U. S. 101, 104 | 4 |
| Waley v. Johnston (CCA-9), 139 Fed. (2d) 117, 121, certiorari denied, 321 U. S. 779 | 8 |
| Widener v. Harris (CCA-4), 60 Fed. (2d) 956, 957 | 14 |


### Statutes


| Statutes | Pages |
|---|---|
| Title 18 USCA, Section 563 | 9, 10 |
| Title 28 USCA, Sections 451, 452, 453 | 1 |
| Title 28 USCA, Sections 463 and 225 | 1 |

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## BRIEF FOR APPELLEE.

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### JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called the "Court below", discharging the writ of habeas corpus previously issued by it, and denying appellant's petition therefor. (Tr. 22-23.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 USCA, Sections 451, 452 and 453. Jurisdiction to review the order of the Court below denying the petition is conferred upon this Honorable Court by Title 28 USCA, Sections 463 and 225.

## STATEMENT OF FACTS.

This is an appeal from an order of the Court below denying appellant's application for relief and discharging the writ of habeas corpus. The writ of habeas corpus was issued herein by the Court below pursuant to the order of this Honorable Court. (Tr. 12.) See

*Lynch v. Johnston* (CCA-9), 160 F. (2d) 950.

After the writ of habeas corpus issued, the Court below appointed counsel to appear on behalf of the appellant. (Tr. 11.) Thereafter the appellee filed a return to writ of habeas corpus (Tr. 14, 15) and the appellant filed a traverse to return to writ of habeas corpus. (Tr. 17, 18.) At the hearings, which were held pursuant to the writ of habeas corpus, appellant's testimony was taken and other testimony, and by stipulation of counsel, affidavits were received in evidence on behalf of the appellant and the appellee. (Tr. 34-133.) The Court below, after hearing the cause and submission of the same, filed the following order denying the application for relief and discharging the writ of habeas corpus:

> "The petition for habeas corpus of Joseph P. Lynch having been briefed, argued and submitted for decision and after complete hearing, the court finds that petitioner was represented by able counsel; that he entered a plea of guilty freely, voluntarily and intelligently; that he was afforded a fair and complete trial;
>
> Specifically the court finds that petitioner was duly represented by counsel appointed by the trial court during all stages of the proceedings; was duly arraigned before said court, knew the nature of the charge against him and competently,

intelligently, freely and voluntarily entered a plea of guilty to the charge contained in the indictment.

Accordingly, It Is Ordered that the petition for habeas corpus be, and the same hereby is Denied: and the writ of habeas corpus previously issued be, and the same hereby is Discharged.

George B. Harris
United States District Court.

October 17, 1947,
(Endorsed)
Filed: Oct. 17, 1947
C. W. Calbreath, Clerk."
(Tr. 26.)

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### CONTENTIONS OF APPELLANT.

Appellant contends in substance that:

(1) He was coerced into entering a plea of guilty.

(2) He was denied his right of the effective assistance of counsel before the trial Court.

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### CONTENTIONS OF APPELLEE.

Appellee asserts that:

(1) Appellant freely, voluntarily and intelligently entered a plea of guilty to the offense with which he was charged before the trial Court.

(2) Appellant was not denied his right of the effective assistance of counsel before the trial Court but was represented at all stages of the proceedings by able counsel.

## ARGUMENT.

### I.

### APPELLANT FREELY, VOLUNTARILY AND INTELLIGENTLY ENTERED A PLEA OF GUILTY TO THE OFFENSE WITH WHICH HE WAS CHARGED BEFORE THE TRIAL COURT.

The appellant seeks to bring his case within the framework of *Waley v. Johnston,* 316 U. S. 101, 104, wherein the Supreme Court declared that

> "a conviction on a plea of guilty coerced by Federal law enforcement officers is no more consistent with due process than a conviction supported by a coerced confession."

The record, however, as elicited during the habeas corpus proceedings, is against him for it shows the following:

Appellant was indicted in the District Court of the United States in and for the Middle District of Pennsylvania in Criminal Cause No. 9692 for the crime of murder. The alleged offense grew out of a killing at the United States Penitentiary at Lewisburg, Pennsylvania, where the appellant was then an inmate. After his indictment, and on or about December 6, 1938, petitioner requested the appointment of counsel, and his request was granted on December 9, 1938. (Appellee's Exhibit "F", Tr. 21.) Petitioner had numerous consultations with his counsel, Cloyd Steininger, Esq., of Lewisburg, Pennsylvania, before pleading guilty to second degree murder. (Affidavit of Appellant's counsel—Appellant's Exhibit "2"—Tr. 21.) This plea was accepted with the approval of the Attorney General. (Appellant's Exhibit "G"—Tr. 21.)

Appellant admitted that he never told his counsel that the victim allegedly made improper advances toward him, because he did not want his fellow inmates at the penitentiary to know this fact.

In his opening brief, at page 12, appellant asserts that prison officials, and impliedly Warden Hill, then the Warden of the United States Penitentiary at Lewisburg, Pennsylvania (now a member of the Board of Prison Terms and Paroles for the State of Pennsylvania), coerced him into pleading guilty. Appellant never made this allegation in his petition or during the habeas corpus proceedings, it being appellee's impression that during these proceedings appellant went only so far as to say that he was coerced into making a "confession" by Warden Hill. Here it should be noted that appellant testified that he bludgeoned the victim and rendered him unconscious, although he stated that he was not sure that the victim died as a result of his violent assault. (Tr. 81-82.) Yet, in connection with this allegedly coerced "confession", the Assistant United States Attorney who prosecuted the case denied that the said "confession" was produced during the proceedings before the trial Court. On the contrary, he asserted in an affidavit, received by stipulation in evidence in these proceedings in lieu of his deposition, that:

> "During the course of the investigation a statement had been made by the defendant to a Special Agent of the Federal Bureau of Investigation. Counsel for the defendant was fully apprised of this statement. Such statement, however, did not in any wise affect the case, inasmuch as it was

not introduced into evidence during the proceedings nor at any time presented to the court, and, consequently, had no bearing whatsoever on the proceedings and could not in any wise have influenced the Court. This 'Statement' was in fact, intentionally withheld in that I had anticipated that the defendant, after a plea of guilty and in the course of the investigation or hearing which was then being conducted by the Court, might take the stand and make statements in extenuation of the crime, and it was my intention to use such statement only in the event that cross-examination became necessary, to which said statement might be pertinent. Inasmuch as he did not take the stand, the statement was never used. I at the time had a further reason for withholding the same, in that I felt that it might require the calling of some of the prisoners, and in penitentiary cases it was our practice, in fairness to such prisoners, to refrain from calling upon them to testify if it could be avoided. Inasmuch as I had been Assistant United States Attorney since August, 1921, and had been in charge of all penitentiary matters which required attention in court, such as any crimes committed and any habeas corpus proceedings instituted, I was fully aware of the problems involved in the administrative as well as in the Court proceedings. * * *

"Among the witnesses called prior to the imposition of sentence was Henry C. Hill, at that time the Warden of the United States Penitentiary, Lewisburg, Pa., and I have no recollection whatsoever of his having made any reference to the so-called statement or confession which the defendant had made to an Agent of the Federal

> Bureau of Investigation. I can state definitely that the contents of the statement were not given and the statement itself was in my files and was not at any time produced. * * *"

Furthermore, the appellant has never testified that it was the allegedly coerced "confession" which caused him to plead guilty to second degree murder. In fact he testified to the contrary.* What, then, was the reason for entering such a plea? Was it because, as he testified, he did not desire to disclose the alleged misconduct of the victim toward him, or was this idea an afterthought, his real motive being to avoid a trial which he feared might result in his being convicted of first degree murder. The trial Court prosecutor, in the concluding words of his affidavit, has furnished us with the logical answer in declaring that:

> "At no time prior to defendant's appearance in Court did I either see or talk to him. My discussions of the case were entirely with his counsel and I did not urge the entry of the plea of guilty. On the contrary, I had some reluctance in agreeing to a plea less than that of murder in the first degree, since it was my personal opinion that the murder was of a brutal nature and my evaluation

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*"Q. Why did you enter a plea of guilty to second degree murder?

A. I entered a plea of guilty to second degree murder to keep from telling the true story of what really took place.

Q. You did not enter a plea of guilty to second degree murder because of any confession you had given?

A. No sir." (Tr. 115, lines 20-25).

* * * * * * *

"Q. The confession had nothing to do with your entering a plea of guilty to second degree murder, did it?

A. No, sir." (Tr. 116, lines 21-23).

of the facts and the evidence was such that I felt that the chances on trial of obtaining a verdict of murder in the first degree, were excellent." (Appellee's Exhibit "G", supra.)

Appellee is of the opinion that the appellant's position here is analogous to the position of an applicant for a writ of habeas corpus described by the Circuit Court of Appeals for the District of Columbia in *Dorsey v. Gill,* 148 Fed. (2d) 857, 876, 877, wherein it was said:

> "* * * No confession was received or even offered in evidence. Appellant was under no coercion when he appeared in Court. There, under the protection of the judge, and with the advice of counsel, he could have stood trial and defied the police force. He did neither, and it seems apparent that the allegations contained in his petition constitute an afterthought, designed to secure a retrial of his case. * * *"

See also

*Waley v. Johnston,* 139 Fed. (2d) 117, 121, certiorari denied 321 U. S. 779,

decided subsequently to the decision of the Supreme Court in the *Waley* case, supra, on which appellant relies, both cases which can give no comfort to the petitioner, wherein this Honorable Court declared:

> "The doctrine of McNabb v. United States, supra, 318 U.S. 322, 63 S. Ct. 608, 87 L. Ed. 819, is confined to the situation where the confession is introduced in evidence. It may not be pressed to the extent that a confession procured as here, but not introduced against him, can give the

defendant an immunity from the result of his pleas of guilty."

The Court below in its order denying appellant's claim for relief, made certain findings, among which was the following:

> "* * * that petitioner * * * entered a plea of guilty freely, voluntarily and intelligently; * * *" (Tr. 21.)

The record of the habeas corpus proceedings clearly shows that this finding is supported by the evidence, and accordingly it should not be disturbed, particularly in view of the fact that appellant has previously been convicted of another felony (Tr. 77) and his credibility is thus impeached.

*O'Keith v. Johnston* (CCA-9), 129 F. (2d) 889, 891.

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## II.

### APPELLANT WAS NOT DENIED HIS RIGHT OF THE EFFECTIVE ASSISTANCE OF COUNSEL BEFORE THE TRIAL COURT BUT WAS REPRESENTED AT ALL STAGES OF THE PROCEEDINGS BY ABLE COUNSEL.

In contending that he was denied his constitutional right of effective assistance of counsel before the trial Court, appellant argues that his case is governed by the decision of the Supreme Court in

*Glasser v. United States,* 315 U. S. 60.

In support of this contention, appellant claims that he was entitled, under Title 18 USCA, Section 563, to

have two attorneys appear in his behalf before the trial Court rather than one attorney because of the fact that he had been indicted for a capital offense. It should be noted, however, that appellant did not advance this particular argument in his opening brief but did so only in his "Assignment of Errors". (Tr. 28.) But regardless of where appellant advanced this particular argument, it is clearly without merit.

A reading of the language of this statute indicates that it was only mandatory upon the Court to appoint one attorney for the petitioner, and discretionary with him whether or not to appoint two attorneys. The result would, of course, be the same even if petitioner had requested the appointment of two attorneys to appear for him, which he did not do, because Title 18 USCA, Section 563, reads in pertinent part as follows:

> "Every person who is indicted of treason or other capital crime shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, * * *"

In further support of his contention that his case is within the class of cases governed by the decision in *Glasser v. United States,* supra, appellant complained in his petition for writ of habeas corpus (Tr. 3-4), although he did not urge it in his opening brief, that he was misled by his attorney into entering a plea of guilty, thinking he would get a ten year sentence in-

stead of a twenty year sentence. Appellant also alleged in his petition, although he did not urge it in his opening brief, that the prosecutor misinformed the trial judge that the minimum penalty for second degree murder was twenty years instead of ten years (Tr. 4), inferring thereby that if the trial judge had actually known what the minimum sentence was, he would have imposed the ten year sentence. This complaint, of course, has no foundation in fact or in law. The facts of this aspect of the case as stated by the trial Court prosecutor in his affidavit as above referred to are as follows:

> "With reference to any allegations that the Court was unaware of the minimum penalty, it was my opinion at the time that the facts in the case would sustain a verdict of murder in the first degree, and during the numerous conferences on the case at which I was present, the various facts were fully discussed with the attorney for the defendant, who sought to obtain our consent to the entry of a manslaughter plea. We reviewed the case with the office of the Attorney General and thereafter informed Mr. Steininger, counsel for the defendant, that in order to save the time and expense of a trial, a plea less than first degree would be accepted but that manslaughter carried only a maximum penalty of ten years and that it was our intention to urge upon the Court the imposition of a sentence of at least twenty years, and accordingly we did not consent to the entry of any plea less than that of murder in the second degree.
>
> Counsel for the defendant had had a long experience in the trial of cases and I know person-

ally, from our various discussions in this case, that he was fully aware of the penalties provided in the statutes for the various degrees involved in the crime charged.

In connection with the imposition of sentences in criminal cases in this District, I instituted the practice of handing to the Court at the time a defendant was before the Court for sentence, a copy of the statute involving the particular crime. In the types of crimes frequently occurring mimeographed copies of the statutes had been prepared and a copy thereof placed in each file and submitted to the Court at the time of sentence. In this particular case, however, which involved the crime of murder which rarely arises in the Federal Courts, the statute was typed. The Court, at the time of imposing sentence, had before him the pertinent statutes upon a typewritten sheet, a carbon copy of which is still in the Joseph P. Lynch file in the office of the United States Attorney.

In connection with the imposition of sentence, and as I had already in our conferences indicated to counsel, I urged upon the Court that, in view of the nature of the offense and all the circumstances surrounding it, the full penalty of twenty years should be imposed. This had no reference to the minimum penalty and it was not at any time referred to as the minimum penalty. As a matter of fact, I was intentionally urging the maximum and both counsel for the defendant and I knew what the statute provided as to minimum and maximum penalty for second degree murder, and the Court at the time of such discussions in Court and at the time of the imposition of the sen-

tence, actually had before him on the bench, a copy of the statute above referred to, fully setting forth the penalties providing for second degree murder.

I can personally state that defendant's counsel, Mr. Steininger, was fully aware of the provisions of the statute pertaining to this offense, inasmuch as during the period from this appointment, December 8, 1938, until the disposition of the case on January 24, 1939, he discussed these statutes repeatedly with myself and other Government counsel in my presence, and sought every possible angle of defense for his client, and discussed the penalty section of 18 USCA 454, as well as the definition of the crimes of murder, first and second degree and manslaughter, in 18 USCA Sections 452 and 453."

(Exhibit "G", supra.)

Finally, this latter complaint, as already indicated, also has no basis in law, as the Circuit Court said, in

*United States v. Lynch* (CCA-3), 132 F. (2d) 111:

"The sentence of 20 years penal servitude was within the competency of the Court to impose. Criminal Code, Section 275, 18 USCA 454. The suggestion that the trial Court intended to impose the minimum sentence (10 years) prescribed by the statute for second degree murder, but mistakenly named 20 years * * *. In any event, the term of the sentence, so long as it is within the prescribed limits fixed by the relevant statute, is not open to review on appeal."

To the same effect see

*Widener v. Harris* (CCA-4), 60 Fed. (2d) 956, 957.

In a further vain attempt to bring his case within the framework of *Glasser v. United States,* supra, appellant seeks to brand his counsel, Cloyd Steininger, a practicing attorney since 1905, as incompetent. He complains that "the attitude of Steininger was one of disinterest." (Appellant's opening brief, page 5, lines 4, 5.) Yet in the same complaint against the alleged "disinterest" of his counsel, he states that counsel "visited him about ten times at the penitentiary". (Appellant's opening brief, page 5, lines 5, 6.) Certainly this is no mark of disinterest. If anything, it is a sign of great interest and great devotion to duty on the part of an attorney for his client. And here it should be added that appellant's attorney stated in his affidavit offered by appellant and received by stipulation in evidence on his behalf that he, Steininger, visited the said appellant not ten times, but twenty-five times, between the day of his appointment and the day of the trial. (Appellant's Exhibit "2", supra.)

Appellant also complains that he did not request the appointment of counsel, but it was forced upon him. This is contrary to the record, which shows that counsel was appointed at appellant's request. (Appellee's Exhibit "F", supra.)

As for appellant's other complaints, that his counsel was too elderly to effectively represent him and that his counsel hesitated to accept appointment for him,

appellee believes they are so completely unfounded and so patently untenable as to call for no further comment from him. Yet so pointed was an observation made by the Court in *Dorsey v. Gill*, supra, and so peculiarly appropriate for the situation which obtains here, that appellee is constrained to set forth its language at this point:

> "Every one who is acquainted with the realities of practice knows the desires of some convicted persons to have their cases tried over again and their frequent repudiation of counsel after their hopes for acquittal or for lenient punishment have failed to materialize. It is easy for such a person to rationalize his own wishful thinking—together with hopeful comments of counsel—into a structure of promises, coercion and trickery; to assume incompetency and disinterest or worse, upon the part of counsel. But mere general assertions of incompetency or disinterest do not constitute a prima facie showing required by the statute to support a petition for habeas corpus. District attorneys and assigned counsel are officers of the court; licensed to practice, upon proof of character and fitness to perform professional duties. There is a presumption of proper performance of duty by each of them, which requires much more than the allegations of the present case to set the procedure of habeas corpus in motion."

The following words of the Supreme Court in
*Johnston v. Zerbst*, 304 U. S. 458, 468,
are likewise particularly appropriate herein:

> "It must be remembered, however, that a judgment can not be lightly set aside by collateral

attack even on habeas corpus. When collaterally attacked, the judgment of the court carries with it a presumption of regularity."

Appellee has deliberately chosen to ignore the argument of appellant that his counsel had "difficulty" interviewing witnesses on his behalf for the reason that here is no complaint that his counsel was *prevented* from interviewing witnesses nor any testimony offered that appellant was denied compulsory process of witnesses essential for his defense. Thus no ground is stated here cognizable in habeas corpus and accordingly it is unnecessary for appellee to dispute, although he believes the allegation that Government officials made it "difficult" for counsel to interview witnesses, can be successfully disputed.

As above indicated, appellant has attempted to bring his case within the framework of *Glasser v. United States,* supra. While the decision in the *Glasser* case seems to indicate that the defendant is entitled to effective assistance of counsel, it does not follow that the mere fact that appellant was dissatisfied with the sentence imposed upon him by the Court, shows he did not receive competent legal assistance. In the *Glasser* case the Supreme Court took great pains to point out that Glasser was in fact deprived of competent and effective assistance of counsel by the Court's appointment of his counsel to represent another defendant. Instances occurring during the trial were referred to by the Court to illustrate the prejudice of Glasser through his attorney being requested to represent two clients. There is nothing in the record of our case at

bar which shows that anywhere in the proceedings before the trial Court was the appellant prejudiced by the services rendered him by his counsel or that his counsel did not in fact defend him to the best of his ability.

In view of the foregoing it is obvious why the Court below in its order denying appellant's application for writ of habeas corpus, made this additional finding:

> "* * * that petitioner was represented by able counsel; * * * that he was afforded a fair and complete trial; * * *"
> (Tr. 21.)

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### SUMMARY.

It is apparent that the trial Court has jurisdiction over the person of the appellant and the offense to which he pleaded guilty; that the sentence which the petitioner is now serving is a valid sentence now in full force and effect; that petitioner was not denied due process of law at any stage of the proceedings before the trial Court, and that petitioner is in the lawful custody of the appellee, the Warden of the United States Penitentiary at Alcatraz Island, California.

## CONCLUSION.

It is respectfully urged that the decision of the Court below is correct and should be affirmed.

Dated, San Francisco,
February 25, 1948.

Respectfully submitted,

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